No. 154.

Brief of Wolcott v Vaile for P. E

Filed Nov. 17, 1897.

UNITED STATES OF AMERICA.

IN

THE SUPREME COURT

QUINCY A. SHAW,
Plaintiff in Error,
vs.
MURRAY M. KELLOGG,
Defendant in Error.

No. 154.
(16,252.)

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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STATEMENT.

On the twenty-first day of June, 1860, there was approved, by the President, an act of Congress, entitled "An Act to confirm certain private land claims in the Territory of New Mexico." The sixth section of that act was as follows:

"Section 6. And be it further enacted, that it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the Town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number; and that it shall be the duty of the Surveyor General of New Mexico to make survey and location of the lands so selected by said heirs of Baca, when thereunto required by them; Provided, however, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act and no longer." (12 U. S. Stat., 72. Printed record, page 2.)

Under this provision of law, Baca Grant No. 4 was located on lands which, at the time of the passage of the act, were a part of the Territory of New Mexico, but are now a part of the State of Colorado.

Baca Grant No. 4, as located, was described as follows:

"Beginning at a point on the eastern edge of the valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the Snowy Range, dividing the waters of the rivers Arkansas and Del Norte; thence east, along said parallel, four and one-half miles; thence south, along a meridian, twelve miles, thirty-six chains and forty-four links distance; thence west at a right angle, twelve miles, thirty-six chains and forty-four links distance; thence north to the specified parallel of latitude; thence east, with said parallel, to the place of beginning." (Printed record, page 4.)

This suit was brought by the plaintiff, Quincy A. Shaw, claiming as owner of Baca Grant No. 4, above described, containing 99,289.39 acres.

The complaint alleged that the plaintiff was the owner of the following "specifically described premises, situated within the outer boundaries of said Baca Grant No. 4, aforesaid, to wit: section twenty-two (22), township one (1) north, one (1) east, according to the plat of said Baca Grant No. 4, as filed and recorded in the office of the County Clerk and Recorder of said Saguache county, and including in said Section 22 certain mineral-bearing property designated by the defendant as the Eastern Star mine, with other mining lands adjacent thereto, within said Section 22. (Printed record, page 1.)

The complaint alleged the plaintiff's title to be in fee simple; alleged an entry and ouster by the defendant, about the fifteenth of March, 1890, as to the premises specifically described; alleged the unlawful withholding of possession of said premises from the plaintiff, to his damage.

A jurisdictional averment appears in the complaint, as follows:

"And plaintiff alleges that the matter in dispute in this cause arises under the laws of the United States, in this, to wit: that the plaintiff's title is based upon an Act of Congress, approved June 21, 1860, entitled, 'An act to confirm certain private land claims in the Territory of New Mexico,' by which act the heirs of Luis Maria Baca, plaintiff's remote grantors, were authorized to select a certain quantity of 'vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies not exceeding five in number,' under and by virtue of which said act and within three years after the passage thereof, plaintiff's remote grantors, the heirs of said Luis Maria Baca, did select and locate the lands hereinabove described as Baca Grant No. 4, including the premises now in controversy between

the plaintiff and defendant, all of which said lands, included within said Baca Grant No. 4, were at the time of the passage of the said act within the then boundaries of the Territory of New Mexico, and the location of the same was approved by the proper officers of the Land Department of the United States, and said land was, by the Surveyor General of the State (then territory) of Colorado, thereunto duly authorized, certified to be non-mineral land; and the plaintiff claims that, by virtue of said statute, and the finding of said Surveyor General, as to the non-mineral character of said land, at the time of its selection and location, the title to all of said premises passed to the heirs of Luis Maria Baca, and through them, by divers conveyances, to this plaintiff, notwithstanding the fact of subsequent discoveries of precious metals within the boundaries of the said Baca Grant No. 4, hereinabove described.

"The defendant, on the other hand, claims and asserts that, under the proper construction of said Act of Congress of June 21, 1860, hereinabove referred to, and notwithstanding the finding of the Surveyor General of the state (then territory) of Colorado as to the non-mineral character of said lands at the time of the selection and location thereof, as said Baca Grant No. 4, the subsequent discovery of precious metals, to wit, silver and gold, upon that portion of the said grant by the said defendant so taken possession of and occupied, excludes from said grant the premises by him so taken possession of, and that this plaintiff has no right thereto." (Printed record, page 1.)

The defendant's answer denied plaintiff's ownership or right to possession; denied that the location of Baca Grant No. 4, under the Act of June 21, 1860, was ever approved by the proper officers of the Land Department of the United States, or that the Surveyor General was authorized to, or did, certify the land in dispute to be non-mineral; and alleged that, at the time of the loca-

tion of Baca Grant No. 4 this land was known to be mineral. The answer then alleged that defendant's grantors discovered a gold-bearing vein on the premises in controversy, in April, 1876, and had located thereon the Eastern Star Mine; that defendant and his grantors had since then complied with the laws of the United States relating to the possessory right to mining claims, in such manner as to entitle them to possession and ownership of said premises as a mining claim. A replication was filed to this answer.

The admissions of the pleadings, and the evidence submitted, show the following facts:

A.—The specific land in controversy is worth more than $2,000, and is now known to be mineral in character. There is no evidence to show that it was known to be mineral, prior to 1876. It is within the limits of the Baca Grant No. 4. (Printed record, page 2.)

B.—The Act of Congress entitled "An Act to *confirm* certain private land claims in the territory of New Mexico," approved June 21, 1860 (12 Stat., 72), contained in Section 6 thereof, the grant to the heirs of Louis Maria Baca, hereinabove set out.

C.—Under this Act of Congress, the following communications and certificates were made and issued by the officers of the Land Department of the United States:

1. Under date of December 8, 1860, the Surveyor General of New Mexico gave to the heirs of Luis Maria Baca a certificate that the amount of land they were entitled to select, under the Act of

June 21, 1860, was 496,446.96 acres, to be taken in five square bodies, upon any of the unoccupied lands, not mineral, of New Mexico. (Printed record, page 3.)

2. Under date of February 5, 1863, the Surveyor General of New Mexico certified to the Commissioner of the General Land Office that the heirs of Luis Maria Baca had selected the land hereinabove described; that this location was the fourth of the series; that it contained 99,289.39 acres, and transmitted copy of the application, which, after giving a description of the land, as above set forth, contained this statement:

"I further state that the said land is entirely vacant, not claimed by anyone; is not mineral, but located for purposes of arable and pastoral agriculture, and is within the limits of the territory of New Mexico, as established in the organic act." (Printed record, pages 3 and 4.)

The territory of Colorado was created by Act of Congress, approved February 28, 1861, and included a portion of what was the territory of New Mexico.

3. Francis M. Case, the Surveyor General of Colorado and Utah, on February 24, 1863, wrote to the Commissioner of the General Land Office, advising him that he had received from the Surveyor General of New Mexico a copy of the application for the location of Baca Grant No. 4, above mentioned, and he adds these words:

"I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats,' and should locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains." (Printed record, pages 4 and 5.)

4. The Commissioner of the General Land Office, on the thirteenth of March, 1863, answered this communication, and, among other things, said:

"It is necessary, before the application can be approved by this office, that it be accompanied by the certificates of the Surveyor General and the Register and Receiver, that the land selected is vacant and not mineral * * * ; especially should the character of the location as to minerals be carefully ascertained, after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall have acquired good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate, setting forth these facts.

"You will also correspond with the Register and Receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office. (Printed record, page 5.)

5. On October 13, 1863, John Pierce, Surveyor General of Colorado and Utah, successor to Francis M. Case, advised the Commissioner of the General Land Office that application had been made for survey of this grant, and he transmitted a copy of a contract made by him with Deputy Surveyor A. Z. Sheldon, with copy of the instructions to said Deputy. (Printed record, pages 5 and 6.)

6. On November 2d, 1863, the Commissioner of the General Land Office returned this contract, without approval, and called attention to the former statement of the Surveyor General as to the remark attributed to ex-Governor Gilpin, and to the

Commissioner's previous letter of March 13th, 1863, as to the necessity of care in ascertaining the facts. (Printed record, pages 6 and 7.)

7. Under date of December 12th, 1863, the Surveyor General answered the communication last above mentioned, stating, among other things, as follows:

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.'

"You refer to a letter of the former Surveyor General of this district, in which he says that he supposes this location was made by Mr. Gilpin, 'for the reason that, in his opinion, it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float, as located, covered any mineral lands.

"I have signed the accompanying certificate, partly from my own knowledge of the country, but mostly for the following reasons:" (Printed record, pages 7 and 8.)

The Surveyor General then proceeds to give several reasons why he certifies that the land is not mineral, and he sends with this letter a certificate, as follows:

"SURVEYOR GENERAL'S OFFICE,
"DENVER, C. T., December 5th, 1863.

"SIR—This is to certify that from good and sufficient evidence, I am perfectly satisfied that the lands on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon, in November, 1863, is not mineral and is vacant. "JOHN PIERCE,

"*Surveyor General of Colorado and Utah.*"

(Printed record, page 8.)

8. No other evidence having been sent to the Commissioner, and no certificate from the Register and Receiver having been forwarded, the Commis-

sioner wrote to the Surveyor General on January 16, 1864, calling attention to previous instructions given, to the effect that the Surveyor General should accompany the official rendition of the certificate with his own statement, and *also* that of the *Register and Receiver*, setting forth the fact that the land selected was vacant and not mineral. The letter then proceeded to state that the evidence furnished was not sufficient, that the certificate was not based upon actual knowledge, and referred again to the statement of ex-Governor Gilpin, and called attention to the fact that the statement of the Register and Receiver had not been received. (Printed record, pages 8 and 9.)

9. Up to this time the notes of survey made by Albinus Z. Sheldon had not been transmitted to Washington, but, from facts which will be presented more fully in the argument, it appears that Mr. Gilpin, who was then the claimant of the grant, went personally to Washington, and submitted additional evidence, including the surveyor's notes, as to the character of the land, as well as of the survey, together with a certificate of the Register and Receiver, which last named certificate reads as follows:

"COLORADO TERRITORY, }
"GOLDEN CITY, December 5, 1863. }

"SIR:—This is to certify that, from good and sufficient evidence, we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis Valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral, and is vacant.

"G. M. CHILCOTT, Register,
"*Land Office, Colorado District.*
"C. B. CLEMENTS, Receiver,
"*Land Office, Colorado District.*"

(Printed record, page 10.)

10. The surveyor, Albinus Z. Sheldon, after having made a survey of the premises, at the end of his notes gives a general description, in the latter part of which is contained the following statement:

"Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle, set forth in the notes." (Printed record, page 11.)

11. Thereupon, on February 12, 1864, the Commissioner of the General Land Office again wrote to John Pierce, the Surveyor General, stating that he had considered his report respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis Park, Colorado; and, after calling attention to some irregularity as to the payment for the survey, and suggesting methods as to how the irregularity may be corrected, proceeds as follows:

"The original field notes, duly verified and authenticated, must be filed in the Surveyor General's office of Colorado. Upon bringing these to the usual satisfactory tests, and finding the same all regular and correct, *you are authorized*, in virtue of the aforesaid sixth section of the said Act of twenty-first of June, 1860, *to approve the said survey*, but in your certificate of approval you will add the special reservation stipulated by the statute—but not to embrace mineral land, nor to interfere with any *other vested* rights, if such exist."

"*The statute does not order the issue of a patent.* The aforesaid law of twenty-first June, 1860, with your plat, approved in the manner indicated, will, therefore, constitute the evidence of title." (Printed record, pages 9 and 10.)

12. After the receipt of the letter last above-mentioned, and under date of March 15, 1864, the field notes of the survey were approved by the Surveyor General, in the following language:

"SURVEYOR GENERAL'S OFFICE, }
"DENVER, C. T., March 15, 1864. }

"The foregoing field notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the seventh day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field notes and the survey they describe are hereby approved.

"JOHN PIERCE,
"*Surveyor General, Colorado and Utah.*"

(Printed record, page 11.)

And thereupon the original plat of the survey of Baca Grant No. 4, was approved by the Surveyor General, in the following language:

"The above map of the boundary lines of Grant No. 4, of the heirs of Luis Maria Baca, in San Luis Valley, Colorado territory, as surveyed by Albinus Z. Sheldon, under his contract bearing date the seventh day of October, 1863, is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of section 6 of the act of Congress approved June 21st, 1860.

"JOHN PIERCE,
"*Surveyor General, Colorado and Utah.*"

"Surveyor General's Office, Denver, March 18, 1864."

(Printed Record, page 11.)

13. The transcript of the field notes thus approved, and a plat of the survey thus approved, were, on March 29, 1864, transmitted to the Com-

missioner of the General Land Office, and the receipt of the same was acknowledged on May 4, 1864 (printed record, page 11), and no objection was then or ever thereafter made thereto.

From and after the date of the receipt of the approved plat and survey, the Government, by many acts, recognized this grant and that the title thereto had passed from the Government to the claimants, the record showing the following, selected by the Court of Appeals from many documents offered in evidence in the trial court:

14. In January, 1868, the owner of the Baca Grant No. 4 asked for the issuance of a patent therefor, notwithstanding the remarks of the Commissioner in his letter to the Surveyor General, bearing date of February 12, 1864. The Commissioner replied as follows:

"Referring to your application of 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca Tract No. 4,' I have to state that the selection authorized by the sixth section of the act of 21st of June, 1860, (Stats., Vol. 12, page 72,) *has been made, and the survey executed and reported to this office*, but *as no provision is made in the statute for the issuing of patent*, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the Baca case, but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted (6 Cr., 128); a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.' (12 Peters' Reports of the Decisions of the Supreme Court of the United States, page 454.)" (Printed record, page 12.)

15. In the year 1879, under the belief that a change in the phraseology of the law would permit the issuance of a patent for this grant, the owner made a second application for a patent, which resulted in the following official communication from the Commissioner of the General Land Office to the Surveyor General of Colorado:

"'D.' G. B. E.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., March 21, 1879.

"*Mr. William L. Campbell, Surveyor General of Colorado:*

"SIR:—I have considered the application of Hon. Wm. Gilpin for a patent to the tract of land known as Baca Claim No. 4, in Colorado.

"Section 6, of the Act of Congress approved June 21, 1860, provided that the heirs of Luis Maria Baca might select a quantity of land equal to that claimed by the town of Las Vegas, to be located on vacant, non-mineral land, in New Mexico, in square bodies, not to exceed five in number, the same, when selected by the heirs, to be surveyed and located bythe Surveyor General of New Mexico.

"It was subsequently ascertained that the quantity of land claimed by the town of Las Vegas, and therefore the amount to be selected by the Baca heirs, was 496,446.96 acres.

"In 1863, the Baca heirs selected the tract of land now in question. This was the fourth tract, three having been previously selected, and therefore this tract was designated as Baca Claim No. 4. It contains 99,289.39 acres, being one-fifth of the amount granted to said heirs.

"This was, at the time of its selection, in the territory of Colorado, but at the date of the Act making the grant—June 21, 1860—the tract was a part of the territory of New Mexico.

"After the selection of this tract, it was surveyed and *located* by the Surveyor General of Colorado, *he having first determined that the land was vacant and non-mineral.*

"The seventeenth section of the Act of Congress, approved February 28th, 1861, gave the Surveyor General of Colorado the same authority concerning the location of this tract as was originally conferred on the Surveyor General of New Mexico.

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the Surveyor General of Colorado that as the statute did not authorize the issuing of a patent, the Act of June 21, 1860, and the plat approved by the Surveyor General, would constitute the evidence of title.

"There is no doubt that government may convey and vest the legal title without issuing a patent, as effectually as may be done by patent. *Larriviere vs. Madegan*, 1 Dillon, 455; *Gregnon vs. Astor*, 2 Howard, 319; *3 Opinions of Attorney General*, 350.

"The Surveyor General was authorized by the act *to locate only vacant, non-mineral land.* Unless the contrary appeared, it would be *presumed, from the act of locating*, that the Surveyor General determined the land was not mineral. But, before locating, the Surveyor General had *expressly found and certified that this land was not mineral.*

"*It is now alleged that the land is mineral;* that the Surveyor General approved the plat of survey 'subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the Act of June 21, 1860, were as respects this question, that the selection and location should be on land determined *at the time of such location*, when the title passed, to be non-mineral land.

"The Act did not intend that if at any subsequent time in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as anyone might choose to allege its mineral character.

"The Surveyor General did not undertake, and had no power, to impose conditions not in the Act.

"If, after fifteen years, the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the Act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption and other acts of Congress? Would such titles ever be considered secure?

"The question as to the *mineral* or *non-mineral character of this land has been passed upon by competent authority;* the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by Section 2 of the Act approved March 3, 1869 (15 Stat., 342), and by Section 2447, Rev. Stat. U. S. But those provisions authorize patent to issue only when claims to land have been confirmed by law; that is, where an act of Congress recognizes a claim to specific land, and does not apply to cases where the acts of Congress only authorize a claim to be made thereafter to land, without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused.

"Very respectfully,

"J. A. WILLIAMSON,
"*Commissioner.*"

(Printed record, pages 12–14.)

16. On June 28, 1884, the Commissioner of the General Land Office wrote the following letter:

"'D.' W. H. W. J. R. D.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
WASHINGTON, D. C., June 28, 1884.

"W. NIEL DENNISON, ESQ.,
Canon City, Colorado:

"SIR:—I have received, by reference from the Department, your letter of June twelfth instant, addressed to the Honorable Secretary of the Interior, relating to the Baca Location No. 4 ('Gilpin grant'), in which you inquire, first, if said grant is located on mineral or non-mineral land; and second, if prospectors will be allowed to hold any mineral discoveries made on said No. 4 prior to the year 1880.

"In reply to said inquiries, I have to say that by the sixth section of the Act of June 21, 1860 (12 Stat., 71), the heirs of Baca were authorized to select the quantity of land awarded to them, in not more than five square bodies, upon vacant non-mineral land; and it was made the duty of the Surveyor-General to make survey and location of the land selected, of course subject to the conditions imposed as to the character of the land awarded.

"In the case of Location No. 4, in question, the Surveyor-General having first ascertained and determined that that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Governor Gilpin for a patent, it was contended before this office that mineral existed in some part of the location, and, therefore, the grantee could not hold the land under the Act. The matter was fully considered and the following conclusions reached:

"'The conditions and provisions of the Act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined, at the time of such location, when title passed, to be non-mineral.

"'The Act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as anyone might choose to allege its mineral character.

"'The Surveyor General did not undertake, and had no power to impose conditions not in the act.

"'The question as to the mineral or non-mineral character of the land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.'

"You will see by the foregoing that the land in question *was determined, in 1864, by the Surveyor General, whose province and duty it was, to be non-mineral;* the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon prior to or since 1880, must probably rest between them and the *holders of the Location No. 4.*

"Respectfully,

"N. C. McFARLAND,

"*Commissioner.*"

(Printed record, page 14.)

17. On June 8, 1889, the Commissioner of the General Land Office wrote the following letter:

"'D.' W. O. C. W. H. W.

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., June 8, 1889.

"*Jno. Duncan & Co., Westcliffe, Colo.*

"GENTLEMEN:—I am in receipt, by reference, of your letter dated the eighteenth ult., addressed to the Honorable Secretary of the Interior, in regard to mines and minerals within the surveyed limits of 'Baca Claim No. 4,' commonly known as the 'Gilpin grant.'

"In reply I have to say that by the sixth section of the Act of Congress, approved June 21, 1860, the Baca heirs were permitted to select a quantity of land equal to that claimed by the Town of Las Vegas, to be located on vacant, non-mineral land in New Mexico, in square bodies, not to exceed five in number; the same, when selected by the heirs, to be located and surveyed by the Surveyor General of New Mexico.

"It was subsequently determined that each of said tracts should contain 99,289.39 acres, the one-fifth part of the area claimed by the Town of Las Vegas.

"In the year 1863 said heirs selected the tract in question, three other tracts having been previously selected.

"At the time of its selection, this tract was in Colorado, but at the date of the Act (June 21, 1860), the tract was in the territory of New Mexico.

"Thereafter, Mr. Gilpin, who claimed the land as the assignee of the Baca heirs, applied for a patent, which was denied him, for the reason that there was no provision of law for the issuance of patents on these locations.

"Mr. Gilpin was, however, given an approved plat of the official survey of this Tract No. 4, as evidence of title, in connection with the Act of Congrest aforesaid, and his purchase from the heirs.

"In determining the various questions involved in the case, this office, on March 21, 1879, decided that the character of the land involved had already been determined, and the matter, therefore, was *res adjudicata*.

" 'The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals. This office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain,' etc.

"The case has, therefore, become final, so far as this office is concerned; and unless authorized to do so by some superior authority, I cannot recognize entries, or filings, within the limits of

said location, as established by the approved survey thereof.

"Very respectfully,
"W. M. STONE,
"*Acting Commissioner.*"

(Printed record, page 15.)

D.—The plaintiff has, through various mesne conveyances, succeeded to the rights of the heirs of Luis Maria Baca, to the lands covered by Baca Grant No. 4, which include the specific premises in controversy in this suit. (Printed record, page 16.)

At the conclusion of plaintiff's evidence, and upon a motion by defendant that the Court direct the jury to find a verdict in defendant's favor, the Court instructed the jury as follows:

"This action, gentlemen of the jury, is to recover a small plot of land in what is known as the Baca Grant No. 4, in the San Luis valley; I think it is in the county of Saguache, but I am not sure whether the county is given in the complaint.

"The plaintiff relies upon an Act of Congress, passed June 21, 1860, by which the heirs of Luis Baca were permitted to locate this tract of land. You have heard the testimony at great length as to the way in which the location was made and surveyed, and all the proceedings in the Land Office in respect to it. Objection is made that the location was not within the time limited by the Act of Congress, which was three years, and that is put upon the ground that there was no sufficient description of the tract located to make it known to the public at large where the location would be, and upon the ground that the initial point from which the survey of the tract would be extended was not at a fixed and determinate point. That was declared in the paper filed with the Surveyor General of New Mexico to be the point where the thirty-eighth parallel of latitude crosses the base of the Snowy Range which divides the waters of the Arkansas and Del Norte Rivers at the eastern

edge of the San Luis Valley. It is said that this is not sufficient to fix the location, and there should have been some monument or some natural object open to the view of all people, from which the lines should be run. Upon that I do not care to enter at length. I shall assume that the testimony which has been delivered before you is sufficient to enable you to determine this point, and that you would determine it under the testimony to have been properly fixed. If the location was so designated as to be understood by the public at large, I am of the opinion that the circumstance that no survey of the location was made within the three years following the passage of the act is not material; a survey was, in fact, made in the latter part of the year 1863, and about six months after the expiration of the three years mentioned in the act. I assume, also, that the survey made by Mr. Sheldon was sufficient in form. The lines were not closed at the northeast corner; there were three or four miles of the north line, and, perhaps, a greater length of the east line, which were not laid at that time, because of the difficulty of traversing the mountains. The surveyor states in his notes that he found it impossible at the season of the year in which he was carrying on the work, to proceed over the mountains, and so the lines were not laid at the time. This survey having been accepted by the officers of the Land Department, and approved by them, it cannot be alleged that it was not in form sufficient; or that there was any defect in it from the circumstance that a portion of the lines were omitted from the survey at the time when it was made.

"Upon that we come to another question, which is the most important in the whole case, and that is, whether mineral lands passed, by the terms of the act, and what was done under it, to the grantees therein. The act itself declared that the location of the tract shall be upon lands vacant and not mineral. The grantees, the heirs of Baca, were not at liberty to select mineral land. The complaint describes the land of which the defendant is said to be in possession, and which he wrongfully with-

holds from the plaintiff, as mineral land; so that you have no question to consider whether the lands were or were not of that character; the plaintiff having averred that they have the character of mineral lands, there is no issue upon that point. So that the question presented and simply stated is whether mineral lands passed under the grant of the Act of June 21, 1860, and, as I have said, the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make, they could not determine the quality of the lands in that respect; that is to say, they could not determine in a manner which would be conclusive upon the Government and upon subsequent claimants under the Government, whether the lands were or were not mineral. In order to make a valid determination of that matter, there must be some participation by the Government in the selection; that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral.

"And so we come to the question, whether anything was done by the Government in that direction at any time whatsoever, or up to the time of the approval of the survey of the lands. It is contended for the plaintiff that the act itself, and the selection of the lands under it, make a good title in the grantees named in the act, and it may be true that no other evidence of title was required. I have not looked into that question particularly, whether there was authority in the Government to issue a patent for the land or not. It is said, and it seems to be established by the various communications from the Land Department, and the officers of that department, that they constantly maintain that there was no authority in the Government to issue a patent for the land, and, therefore, they have declined to issue it. Upon all such occasions, the officers of that department declared that the Act of Congress and the survey, with the plat of the land, constituted the title of the grantees under the act. No further communication, and no document or paper, could be issued by the Government in con-

firmation of the title of the grantees. However that may be, if it appeared that the officers of the Land Department in Washington had at any time passed upon the question of the conclusiveness of the grant, and had declared in terms that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government, and binding upon all who might subsequently make claim upon it.

"*It seems upon examination of the testimony which has been offered to you that no such determination was made. The communication upon which the Surveyor General of the Territory of Colorado approved the plat and the notes of survey expressly required, in making such approval, that it should be declared that the lands within the tract were not regarded as mineral.*

"The instruction of the Commissioner of the General Land Office, as found in a letter to the Surveyor General of Colorado, of date February 12, 1864, is that he will be authorized to approve the plat upon finding it to be correct, in the usual way; and the Commissioner adds: 'In your certificate of approval, you will add the special reservation stipulated by the statute, "but not to embrace mineral land, nor to interfere with any other vested rights, if such exist." '

"*That is to say, the Surveyor General of Colorado was authorized to approve the plat in so far as it did not embrace mineral land; the Commissioner of the General Land Office apparently expressly declining to decide the question whether the land selected was or was not of that character.*

"Now, it is true that the Surveyor General did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the Act of June 21, 1860.

"*And taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.*

So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands as directed by the Commissioner, and if this be the correct construction of the papers and documents, and of the act of the Surveyor General in making the approval, nothing thereafter done by the officers of the Land Department in the way of declaring what the force and effect of the approval might be would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.

"There are several communications from the department to persons who were more or less interested in the tract, or who assume to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey.

"*I cannot give to these communications any effect whatever. We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office or to give it any other effect than that which it appears to have from the letter of February 12, 1864.*

"*Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in this case, that the Act of June 21, 1860, and what was done under that Act from time to time, did not vest in the grantees of Louis Maria Baca, and their successors in interest, the mineral lands which may be within the tract located.*

"This, of course, has no effect whatever upon such part of the tract, which seems to be by far the greater part, as is not mineral. That which is pastoral and agricultural only, cannot be correctly described as mineral land, and it would doubtless pass under the grant without any question whatever such as is presented to us here.

"*The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine, is embraced in the Grant to the heirs of Luis Maria Baca, there is, of course, nothing left for you to do but to return a ver-*

dict upon the testimony for the defendant in the suit."

(Printed record, pages 16–19.)

SPECIFICATION OF ERRORS.

The plaintiff in error, who was plaintiff in the trial court, says there is manifest error in the judgment and proceedings of the trial court in this cause, in this, to-wit:

1. The Court erred in sustaining the motion of the defendant that the jury be directed to return a verdict in defendant's favor, to which ruling of the Court the plaintiff at the time excepted. (Printed record, page 16.)

2. The Court erred in directing the jury to return a verdict for the defendant, to which direction of the Court the plaintiff at the time excepted. (Printed record, page 16.)

3. The Court erred in its instructions to the jury in this: That having instructed the jury that if the officers of the Land Department at Washington had passed upon the conclusiveness of the grant, and had declared in terms that the land was not mineral, this determination might be binding as against subsequent claimants. The Court further instructed the jury as follows: "*It seems upon an examination of the testimony which has been offered to you, that no such determination was made;*" to which last instruction of the Court, so given to the jury, the plaintiff at the time excepted.

4. The Court erred in instructing the jury as follows: "*The communication upon which the Surveyor General of the Territory of Colorado approved*

the plat and the notes of survey, expressly required in making such approval that it should be declared that the lands within the tract were not regarded as mineral;" to which instruction of the Court the plaintiff at the time excepted. (Printed record, page 19.)

5. The Court erred in his instructions to the jury in this, to wit: That, after having stated to the jury as follows, "The instruction of the Commissioner of the General Land Office, as found in a letter to the Surveyor General of Colorado of date February 12, 1864, is that he will be authorized to appprove the plat upon finding it to be correct, in the usual way, and the Commissioner adds: "In your certificate of approval you will add the special reservation stipulated by this statute, but not to embrace mineral land, nor to interfere with any other vested rights, if such exist," the Court then further instructed the jury as follows: "*That is to say, the Surveyor General of Colorado was authorized to approve the plat in so far as it did not embrace mineral land;*" to which last instruction of the Court the plaintiff at the time excepted. (Printed record, pages 19 and 20.)

6. The Court erred in his instructions to the jury in the following statement, to wit: "*The Commissioner of the General Land Office, apparently, expressly declining to decide the question whether the land selected was or was not of that character,*" to which statement, so given in his instructions to the jury, the plaintiff, at the time, excepted. (Printed record, page 20.)

7. The Court erred in his instructions to the

jury in this, that after stating, "It is true that the Surveyor General did not put these words in his approval. In the approval which he in fact made, he said that it was subject to the provisions of the Act of June 21, 1860." The Court then further instructed the jury as follows: "*Taken in connection with the instructions under which he was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the approval.*" to which last statement of the Court, so given in his instructions to the jury, the plaintiff, at the time, excepted. (Printed record, page 20.)

8. The Court erred in his instructions to the jury, in the following statement, to wit:

"*So that I feel bound to say that the approval was with condition that the plat should not embrace mineral lands, as directed by the Commissioner.*"

To which instruction the plaintiff, at the time, excepted. (Printed record, page 20.)

9. The Court further erred in giving to the jury the following instruction, to wit:

"*And, if this be the correct construction of the papers and documents, and of the act of the Surveyor General in making the approval, nothing thereafter done by the officers of the Land Department, in the way of declaring what the force and effect of the approval might be, would at all change the character of the transaction, or give to the approval any other or different meaning from that which should be ascribed to it at the time it was made.*"

To which instruction of the Court, the plaintiff, at the time excepted. (Printed record, page 20.)

10. The Court erred in his instructions to the jury in this, to wit: That, after having stated

to the jury as follows: "There are several communications from the department to persons who were more or less interested in the tract, or who assumed to have some interest in it, in which the Commissioner, or some one connected with the department, assume to say that the matter of the mineral character of the land was passed upon at the time of the approval of the survey." The Court then further instructed the jury as follows: "*I cannot give to these communications any effect whatever.*" to which last statement and conclusion of the Court, so given in his instructions to the jury, the plaintiff at the time excepted. (Printed record, page 20.)

11. The Court erred in instructing the jury as follows:

"*We must assume that the Commissioner had no authority to thus construe the decision of his predecessor in office, or to give it any other effect than that which it appears to have from the letter of February 12, 1864.*"

To which instruction of the Court the plaintiff at the time excepted. (Printed record, page 20.)

12. The Court further erred in instructing the jury as follows:

"*Upon all this, gentlemen, I feel compelled to state to you, upon the principal matter embraced in the case, that the Act of June 21, 1860, and what was done under that act from time to time, did not vest in the grantees of Luis Maria Baca, and their successors in interest, the ral lands which may be within the tract located.*"

To which instruction of the Court to the jury the plaintiff at the time excepted. (Printed record, page 21.)

13. The Court further erred in instructing the jury as follows:

"*The proof failing in this regard, gentlemen, to show that the land which is occupied by the defendant and which he claims as a mine, is embraced in the grant to the heirs of Luis Maria Baca, there is of course nothing left for you to do but return a verdict upon the testimony for the defendant in the suit.*"

To which instruction of the Court, and each part thereof, the plaintiff at the time excepted. (Printed record, page 21.)

14. The Court erred in permitting the jury to return, and in receiving a verdict in favor of the defendant; to which action of the Court the plaintiff at the time excepted. (Printed record, page 21.)

15. The Court erred in entering judgment in this cause in favor of the defendant; to which action of the Court the plaintiff at the time excepted.

For which errors the plaintiff in error prays that the judgment of the trial Court be in all things reversed.

QUESTIONS SUBMITTED:

The United States Circuit Court of Appeals for the Eighth Circuit submits to this Court three questions for answer:

"*First.*—[1] Was the action of the Commissioner of the General Land Office, or of the Surveyor General of Colorado, in 1863 and 1864, evidenced by the foregoing certificates and communications, a decision by the proper officer that none of the lands in said Baca Grant No. 4 were mineral lands? and

"[2] A valid location upon the ground covered

by said grant of the selection of that tract by the heirs of Baca, under Section 6 of the 'Act to confirm certain private land claims in the territory of New Mexico,' approved June 21, 1860 (12 Stat., 72); or

"[3] Was the action of these officers a refusal to decide that question? and

"[4] Either an attempted or actual location of the selection of said heirs, on *that part only* of the land described as Baca Grant No. 4, which should not, *any time in the then future*, be found to be mineral land?"

The plaintiff in error contends that this question should be answered as follows:

To clause [1], "Yes, as then known"; to clause [2], "Yes"; to clause [3], "No"; to clause [4], "No."

"*Second.*—Was the title to that portion of the lands described as Baca Grant No. 4, which is in controversy in this cause, and which was mineral land, but which was *not known* to be mineral land until 1876, vested in the heirs of Baca and their successors in interest, by the said Act of Congress and the action of the Commissioners of the General Land Office and of the Surveyor General, evidenced by the foregoing certificates and communications?"

The plaintiff in error maintains that this should be answered "Yes."

"*Third.*—Was the direction of the Circuit Court to the jury, to return a verdict for the defendant in this case, right?"

We urgently insist that the answer to this inquiry should be "No."

BRIEF OF ARGUMENT.

It will appear, from the foregoing statement of this case, that the questions at issue arise entirely from the instructions of the Court. It will also appear that the errors complained of relate to the construction which the trial Court placed upon certain documents introduced in evidence, and the conclusions of fact that he derived therefrom, as well as to the application of the law to the ultimate rights of the plaintiff.

The errors as assigned point out specifically the parts of the instructions complained of. The whole subject, however, can be discussed under the following general propositions:

1. As early as May 4, 1864, the title of the Government was divested, and that of the heirs of Baca fully perfected, as to that tract of land designated as Baca Grant No. 4, and the rights of the plaintiff are the same as if Government patent had then been issued for said lands.

2. The proper officers of the Government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. That determination is conclusive against all subsequent claimants.

3. No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or except therefrom any portion of the surveyed premises.

I.

As early as May 4, 1864, the title of the Government was divested and that of the heirs of Baca fully perfected, as to that tract of land designated as Baca Grant No. 4, and the rights of the plaintiff are the same as if Government patent had been then issued for said lands.

By the Act of June 21, 1860, the Congress of the United States granted to the heirs of Baca a certain quantity of land, in lieu of an equivalent area claimed by them near the town of Las Vegas, under the treaty of Guadalupe Hidalgo.

This land was not a *donation* to the heirs of Baca. These heirs were claiming to own lands under a title which the Government was bound to protect, under the treaty of Guadalupe Hidalgo. (See documents referred to in the Act of June 21, 1860.) These lands were granted in lieu of the lands so claimed, the area of which was ascertained to the very fraction of an acre, and became the exact measure of the new lands granted. (Printed record, page 3.)

Upon the selection of these lands by the grantees named, the duty was imposed upon the *Surveyor-General* to survey and *locate* the same. No provision was made in the granting act for the issuance of a patent. The Act itself constituted a grant by the Government, which became specific, and attached to the lands selected when the survey and location were made by the Surveyor-General.

The title of the Act of June 21, 1860, shows that it was the intention of Congress to "confirm" the title of the land to the grantees named. (12 U. S. Stats., 71.) This legislative intention is very ap-

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The title of the Act of June 21, 1860, shows that it was the intention of Congress to "confirm" the title of the land to the grantees named. (12 U. S. Stats., 71.) This legislative intention is very ap-

parent, from a subsequent Act relating to the same subject; for, on June 11, 1864, this Act and this section of the Act were amended so as to extend the time as to one of the five parcels referred to, although not the parcel which is now in controversy. The language of the amending Act was that Section 6 should be "so amended as to enable the heirs of Luis Maria Baca to raise and withdraw the selection and location of one of the square bodies of land *confirmed to them by said Act;*" and after designating the particular tract referred to, and authorizing a new selection, the language of the amendatory Act is as follows:

"And upon such selection and relocation, the title to said square body of land, the same being the one-fifth part of the private claim *confirmed to said heirs as aforesaid*, so selected and relocated, shall be and is hereby confirmed to the said heirs of Luis Maria Baca, as fully and perfectly as if the same had been selected and located within three years from and after the approval of the act aforesaid."

13 U. S. Stats., 125.

At a very early date this Court construed a similar act as being an immediate grant. A statute of the State of North Carolina, passed in 1782, provided in its tenth section as follows:

"That 25,000 acres of land shall be allotted for, and given to, Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this State entertains of the extraordinary services of that brave and gallant officer."

The Court used this language concerning that enactment:

"It is clearly and unanimously the opinion of this Court that the act of 1782 *vested a title* in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act and returned in March, 1783, gave precision to that title and attached it to the land surveyed."

Rutherford vs. Greene's Heirs, 2 Wheat., 197, 206.

"An act of Congress *confirming* a title makes a legal title without a patent." (Syllabus.)

Grignon's Lessee vs. Astor, 2 How., 319.

"This Court held, in *Strother vs. Lucas*, 12 Pet., 454, 'that a grant may be made by a law as well as a patent, pursuant to a law, is undoubted; and a *confirmation* by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*.'"

Choteau vs. Eckhart, 2 How., 372.

See, also—

Larriviere vs. Madegan, 1 Dill., 455.

Under a statute quite similar to the one now under consideration, this Court also uses the following language:

"It does not require the production of proofs before any commission or other tribunal established for that special pupose, but confirms, *proprio vigore*, the rights, titles and claims to the lands embraced by it, and operates as a grant, to all intents and purposes. Repeated decisions of this Court have declared that such a statute passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by a law as well as by a patent pursuant to a law."

Ryan *et al.* vs. Carter *et al.*, 93 U. S., 78, 82.

This, then, was a grant *in præsenti*, which would attach to certain lands, upon the doing of certain things: First, an ascertainment of acreage, which depended on the area of the claim at Las Vegas; and the duty of ascertaining this acreage devolved on the Government, and was immediately performed, the *quantity* of the land thus became definite. Second, the *selection* was to be made by the grantees, and this selection being made, the *locus* of the grant became definite. These two things were to be done, and were done, within three years. A third requirement was embodied in the statute, to be performed by the Government, and not by the grantees. It was not covered by the limitation of three years upon the *right* "granted to the heirs of Baca," but it was a duty imposed upon the Surveyor-General. That duty was to "survey" the land selected, and thereby give precision and the sanction of governmental authority to the boundaries. The duty included also the obligation to "locate" the land, and in so locating to confine it to the character of land fixed by the granting act, to wit: "vacant land, not mineral, in the Territory of New Mexico."

These acts were all performed. The area of land to which the heirs of Baca were entitled under the grant was ascertained by the Surveyor-General of New Mexico, and a certificate thereof was given to the grantees on December 8, 1860. (Printed record, page 3.) The *quantity* on that date became certain.

The heirs of Baca *selected* this tract on December 12, 1862, and on that day requested a survey. (Printed record, page 4.) This fixed the *locus* of the grant. All things which the granting act re-

quired the heirs of Baca to do within three years were then completed six months before the expiration of the time limited.

The Surveyor-General surveyed the land and gave to the heirs of Baca a plat thereof, approved by him. (Printed record, pages 10 and 11.) This gave precision to, and made a governmental record of, the grant.

The Surveyor-General *located* the land, which he could do only upon ascertaining that it was vacant land, not mineral, and was within the territorial limits fixed by the granting act. (Printed record, pages 8, 10, 11 and 13.) The *character* of the land thereby became certain and within the terms of the grant.

These final acts were all completed early in 1864. There was nothing further to be done, either by the grantees or by the Government, to complete the transfer of title. A patent, if issued, would only be *evidence* of the grant. The law did not provide for this documentary evidence. The grant was complete without it. If any special or general law had provided for the issuance of a patent after the completion of all requirements of the statute, the heirs of Baca or their assigns would have been entitled to such patent, because both they and the officers of the Government had duly performed every preliminary act contemplated by the granting statute. The rights of the grantees were, therefore, as complete, and should be considered the same as if they had received a patent for these lands.

We call attention again to the case of *Rutherford vs. Greene's Heirs*, where it was held that the granting statute "vested a title" in General Greene

and "that the survey made in pursuance of the act * * * gave precision to that title, and attached it to the land surveyed." The Court there further held as follows: "That his rights are not impaired by the Act of 1783 and the entry of appellant, all of which are *subsequent to his survey*."

2. Wheat., 206.

In a later case, this Court says:

"When it [the survey] was made and the field notes returned to the Surveyor-General's office, and the description and plat made out in form and approved by the Surveyor-General, it was conclusive evidence as against the United States that the land *granted by the confirmation of Congress* was the same described and bounded by the survey, unless an appeal was taken by either party or an opposing claimant, to the Commissioner of the General Land Office. This consideration depends on the fact that the claimant and the United States were parties to the selection of the land; for, as they agreed to the survey, they are mutually bound and respectively estopped by it."

Menard's Heirs vs. Massey, 8 How., 293, 313.

Under a similar statute, where the agents of the Government were the Register and Receiver, this Court said:

"It rested with the Register and Receiver to ascertain the location of the land confirmed to Cousin, from the evidences of claim recorded and filed with the Register; and having decided where and how the land should be located and surveyed, the courts of justice cannot reverse that decision. The power of revision is vested in the Commissioner of the General Land Office."

Cousin vs. Labatut, 19 How., 202, 209.

Again, the Court says:

"When the surveys were made and the plats returned and approved and recorded by the Surveyor General of Illinois and Missouri, and recognized as valid at the General Land Office (as the patent to Forsyth shows it was), it bound the parties to it, the confirmee and the United States. Nor can either side be heard to deny that the land granted by the Act of 1823 is the precise lot Forsyth was entitled to, such being the settled doctrine of this Court."

Bryan vs. Forsyth, 19 How., 334, 336.

"A legislative confirmation of a claim of land is a recognition of the validity of such claim, and operates as effectually as a grant or quit claim from the Government. * * * If the claim be to land with defined boundaries or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of the title. If the claim be to quantity and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated."

Langdeau vs. Hanes, 21 Wall, 521, 530.

In the case at bar the Land Department of the Government acted in accordance with the well-established principles of law announced in the authorities here cited. While the proceedings were in progress, and before they were completed, the Commissioner of the General Land Office advised the Surveyor General as follows:

"The statute does not order the issue of a patent. The aforesaid law of June 21, 1860, with your plat approved in the manner indicated, will, therefore, constitute the evidence of title." (Printed record, page 10.)

This was written by Commissioner Edmunds, February 12, 1864. Four years later, Commissioner Wilson, on January 14, 1868, in response to an application for a patent, said:

"I have to state that the selection authorized by the sixth section of the Act of June 21, 1860 (Stats., Vol. 12, page 72), has been made, and the survey executed and reported to this office, but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title. * * * But that a grant may be made by a law as well as a patent pursuant to a law is undoubted; * * * a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*." (Printed record, page 12.)

Commissioner Williamson, in 1879, officially announced the same conclusion. (Printed record, page 13.)

The final certificate of approval to the survey of Baca Grant No. 4 bears date of March 15, 1864. The certificate attached to the plat is dated March 18, 1864. We have, however, in the proposition under discussion, mentioned the date of May 4, 1864, as the date at which this title was fully consummated, and the reason for the fixing of this date is that up to that time the matter was the subject of revision by the Commissioner of the General Land Office.

We shall have occasion to discuss, under the next proposition, the relations between the Commissioner of the General Land Office and the Surveyor General, in the performance of duties under this Act. It is sufficient to say here that there is absolutely no law or precedent which requires an affirmative approval by the Commissioner of the

General Land Office, of either the survey or the location. The authority of the Commissioner of the General Land Office in the premises rests only on the fact that he has general supervision and control, under the statute reorganizing the General Land Office, and in matters of controversy an appeal will lie to him; he has the right to *veto*, we may say, the action of the Surveyor-General. But in the absence of objection from the Commissioner of the General Land Office, after facts are called to his attention, the act of the Surveyor-General is final and conclusive as the act of the Government.

The Supreme Court of the United States, in an extended discussion of the subject, and after quoting from Secretary Schurz, uses this language:

"There was nothing in the Act of 1796, *or any subsequent acts*, which required the approval of the Commissioner of the General Land Office, before the survey became final and the plats authoritative. Such a theory, said the Secretary, is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but it is contrary to the uniform practice of the department."

Frasher vs. O'Connor, 115 U. S., 102, 114.

In the case at bar, after a very full investigation of the facts relating to the location, and after a demand by the Commissioner for more evidence than had been originally produced, and upon the furnishing of such evidence, the Commissioner in terms authorized the Surveyor General to approve the plat and survey, the latter officer being the one designated by statute to make such approval, and the authorization by the Commissioner being under his general power of super-

vision of the public lands and their disposition. After this was done, the approved plat and transcript of approved field notes were sent, on March 29, 1864, to the Commissioner of the General Land Office (printed record, page 11); and on May 4, 1864, the Commissioner acknowledged their receipt, and made no objection thereto. (Printed record, page 11.)

This Court, speaking of the right of a claimant to a patent, has used this language:

"That right became perfected when the certificate of the Surveyor General and accompanying proofs were received by the Commissioner of the General Land Office and *he found no valid objection to them.*"

Stark vs. Starrs, 6 Wall., 413; see, also, pages 417 and 418.

From and after *May 4*, 1864, as is shown by the numerous documents mentioned in the statement preceding this brief, the Government recognized that the title to this grant had passed. The *absence of objection* on the part of the Commissioner, when the receipt of the papers was acknowledged by him, on May 4, 1864, concluded all proceedings relating to this title. Whatever question might have existed prior to that date, was then closed. Under the authorities we have already cited, and upon the facts existing in this case, from that date on, the title of Baca Grant No. 4 should be considered in the same light as if a Government patent had on that date been issued.

II.

The proper officers of the Government, after investigation of the facts, determined, in 1864, that the land in controversy was not mineral. That determination is conclusive against all subsequent claimants.

1. Who was the proper officer to determine the character of the land on behalf of the Government?

The trial Court, in his instructions to the jury, said:

"If it appeared that the officers of the Land Department *in Washington* had at any time passed upon the question of the conclusiveness of the grant, and had declared *in terms* that the land was not mineral, or to that effect, it might be said that the grantees took the land as not being mineral, and, whatever its character, that the question was properly decided by the Government and binding upon all who might subsequently make claim to it." (Printed record, pages 18 and 19.)

The Court, however, then proceeds to say;

"It seems, upon examination of the testimony which has been offered to you, that no *such determination* was made." (Printed record, page 18.)

We think the trial Court was in error in assuming, as he does, in these instructions, that there should be an express declaration by some officer of the Land Department *in Washington*, that the land was not mineral. The Court confuses the legal duties of the several officers of the Land Department.

We confidently assert that there is absolutely nothing in the statutes, from one end to the other, up to the time of the approval of this location, that requires the affirmative action of the Commissioner

of the General Land Office, or of any other officer in Washington, in determining either the correctness of the survey or the quality or nature of the land selected and located. These are duties uniformly placed upon the *Surveyor General*, from whose decision an appeal will lie to the Commissioner of the General Land Office, as will also an appeal from the latter lie to the Secretary of the Interior.

The only statute which we have been able to find that requires an approval by the Commissioner of the General Land Office applies only to lands in the state of California, and it was passed after the approval of the survey of Baca Grant No. 4. It is the Act of July 1, 1864 (13 Stats., 332), entitled "An act to expedite the settlement of titles to lands in the state of California." It provides for the transmission to the Commissioner of the General Land Office of the survey and plat, and says: "If the survey and plat are approved by the said Commissioner, he shall endorse thereon a certificate of his approval." (See Section 1.) The language of the act shows that it has reference to no lands except those situated in California.

There was a subsequent act for the purpose of quieting land titles in California, passed July 23, 1866 (14 Stats., 218.) The eighth section of the last mentioned act provided, in certain contingencies, as follows:

"It shall be the duty of the Surveyor General of the United States for California * * * to cause the lines of the public surveys to be extended over such land, and he shall set forth in full the situation of such grant and according to the lines of public surveys, the quantity of land confirmed

in such final decree, * * * and all the land not included in said grant, as so set forth, shall be subject to the general land laws of the United States."

It will be observed that the authority given to the Surveyor General in this last-mentioned statute is very similar to that given to the Surveyor General in the Act of June 21, 1860, which provided that—

"It shall be the duty of the Surveyor General of New Mexico to make survey and location of the lands so selected by the heirs of Baca."

This Court has, however, held repeatedly and in emphatic language, notwithstanding the previous Act of July 1, 1864, that the plats and surveys made by the Surveyor General, under Section 8 of the Act of July 23, 1866, need not be approved by the Commissioner of the General Land Office.

Frasher vs. O'Connor, 115 U. S., 102.
McCreery vs. Haskell, 119 U. S., 327.
Tubbs vs. Wilhoit, 138 U. S., 134.

As the Act of July 1, 1864, was, in any event, enacted after the rights of the heirs of Baca had matured, it could, of course, not affect the question in controversy, even if it had related to lands generally in the United States.

There is one other act which seems to contemplate an approval by an officer *in Washington*, and that is the general railroad right-of-way act of March 3, 1875, which contemplates an approval by the *Secretary of the Interior*.

18 U. S. Stats., 482.

It is possible that the trial Court was led to

the view he entertained as to the necessity of an approval *in Washington*, by the familiar course of procedure under this railroad right-of-way act. It, however, needs no argument to show that this Act, passed as it was in 1875, and relating only to the rights-of-way of railroads, cannot be used in any way as an authority for the position assumed by the Court in this case.

It is undoubtedly true that the Commissioner of the General Land Office, and, above him, the Secretary of the Interior, have the power of supervision, and may direct subordinate officers as to how they shall execute the duties imposed upon them by law, in such a way as best to protect the interests of the Government and of its citizens; any regulations in that behalf, of course, to be not inconsistent with the statutes. This relation of the superior officers of the Land Department to subordinate officials is well discussed in the case of *Knight vs. U. S. Land Association*, 142 U. S., 161, 177.

The Surveyor General is an officer that has been recognized by the laws of the United States, almost from the time of the foundation of the Government, and long before the original organization of the General Land Office, and duties have by statute been specifically imposed upon that officer from the earliest time.

It is interesting to observe the connection of all the statutes, one with another, from the earliest period, relating to the powers and duties of the Surveyor General.

The Act of February 28, 1861, creating the territory of Colorado, provided for a Surveyor Gen-

eral, fixed his duties and, among other things, provided that his duties, powers, obligations and responsibilities should "be the same as those of the Surveyor General of *New Mexico*, under the direction of the Secretary of the Interior, and such instructions as he may from time to time deem it advisable to give him."

12 U. S. Stats., page 176.

The Surveyor General of New Mexico was given certain comprehensive powers by the Act of July 22, 1854, with the additional provision that his "power, authority and duties shall be the same as those provided by law for the Surveyor General of *Oregon*."

10 U. S. Stats., 308.

The powers and duties of the Surveyor General of Oregon are set forth in the Act of September 27, 1850, and certain supplementary Acts, and, after providing for specific powers and duties, this statute also provided that the Surveyor General "shall have the same authority, perform the same duties respecting the public lands and private land claims * * * * as are vested in and required of the Surveyor of Lands in the United States *northwest of the Ohio*, except as herein provided."

9 U. S. Stats., 496.

The powers of the Surveyor of Lands in the United States northwest of the Ohio were fixed by the Act of May 18, 1796, where they are specifically and at large set forth.

1 U. S. Stats., 464.

So that we find that various statutory provisions, from 1796 down to the creation of Colorado Territory, taken together, provide for the powers and duties of the Surveyor General of the territory of Colorado, the earliest of these Acts being a number of years before there was a Commissioner of the General Land Office.

All of these statutory provisions relating to the Surveyor General designated him as the person to survey and locate public lands and private land claims, and did not make the validity of his acts in any way dependent upon an affirmative approval by any superior officer. His superior officer was, for a time, the Secretary of State; at another time, the Secretary of the Treasury; and at another time, the Secretary of War. The Department of the Interior was created in 1849. But in none of these acts was there any provision requiring the affirmative approval by the Secretary, or any other officer, of the acts done by the Surveyor General.

The General Land Office was originally established by Act of April 25, 1812, and the chief officer was to be called the "Commissioner of the General Land Office." It was made an office of the Treasury Department. The duties of the Commissioner of the General Land Office were thus defined:

"Under the direction of the head of the department, to superintend, execute and perform all such acts and things touching or respecting the public lands of the United States, and other lands patented or granted by the United States, as have heretofore been directed by law to be done or performed in the office of the Secretary of State and the Secretary and Registrar of the Treasury, and of the Secretary of War, or which shall hereafter by law be assigned to the said office."

2 U. S. Stats., 716.

In this Act nothing whatever was said about any approval, by the Commissioner of plats, surveys or locations made by the Surveyor General.

By the Act of July 4, 1836, the General Land Office was reorganized, and the first section of that Act provided:

"That from and after the passage of this Act, the executive duties now prescribed, or which hereafter may be prescribed, by law, pertaining to the surveying and sale of the public lands of the United States, or in any wise respecting said public lands, and also such as relate to private claims of lands, and the issuing of patents for grants of land under the authority of the Government of the United States, shall be subject to the *supervision and control* of the Commissioner of the General Land Office, under the direction of the President of the United States."

5 U. S. Stats., 107.

There was nothing whatever in this Act which required the Commissioner of the General Land Office to approve plats, surveys or locations made by the Surveyor General, but the general language used in reference to his power of supervision and control, manifestly left the matter to his discretion and judgment, as to how surveys and locations should be treated and authenticated.

By the Act of May 30, 1862, which was subsequent to the statutory grant to the heirs of Baca, but prior to the location of Baca Grant No. 4 and the survey thereof, it was provided:

"That the printed manual of instructions relating to the public surveys, prepared at the General Land Office, bearing date February 22, 1855, the instructions of the Commissioner of the General Land Office, and the special instructions of the Surveyor General, when not in conflict with said printed

manual, or the instructions of said Commissioner, shall be taken and deemed to be a part of every contract for surveying the public lands of the United States."

12 U. S. Stats., 409.

The manual of February 22, 1855, from that time on, was a matter of statutory obligation as to the surveys of public lands. That manual, however, thus adopted by statute, provided, among other things, as follows:

"The original field books, each bearing the written approval of the *Surveyor General*, are to be substantially bound into volumes of suitable size, and retained in the Surveyor General's office, and certified transcripts of such field books * * * are to be forwarded from time to time to the General Land Office."

This manual also provided for a form of approval of plats and surveys, which was to be signed only by the *Surveyor General*.

Now, it was pursuant to a long-established course of legislation that the provisions of the particular grant in controversy were enacted; and the *only* officer mentioned in the grant, on whom any duty is imposed, is the *Surveyor General*. The language of the act is:

"And it shall be the duty of the *Surveyor General* of New Mexico to make survey *and location* of the lands so selected by said heirs of Baca, when thereunto required by them." (Printed record, page 2.)

We shall not dispute the proposition that it would be within the power of the Secretary of the Interior, or of the Commissioner of the General Land Office, under the general jurisdiction of those

officers, giving supervision and control over the survey and disposition of the public lands, to make a rule that surveys and locations should, before becoming finally effective, receive the express approval of the Commissioner of the General Land Office. But no such rule had ever been made, and the error of the trial Court is in assuming, as matter of law, that the proper officer to pass upon the question of location, including the character of the land, was some officer *in Washington*, and that such officer must *in terms* declare his decision. The whole current of legislation shows that questions of this character were to be passed upon by the *Surveyor General*, and that his action is conclusive, except as it may be controlled or modified by subsequent action on the part of the Commissioner of the General Land Office or the Secretary of the Interior.

It is not apparent how any distinction could be made by the Court below, between the authority of the Surveyor General as to the survey itself and as to the location, in so far as the latter determines the character of the land located.

The proposition which we are here discussing from original sources, that there is nothing in the law requiring affirmative action of the Commissioner of the General Land Office to support the validity of the acts of the Surveyor General, has been the subject of judicial cognizance by this Court.

We have already called attention to the case of *Frasher vs. O'Connor*, 115 U. S., 102, where it was said:

"There was nothing in the act of 1796, or any subsequent acts, which required the approval of

the Commissioner of the General Land Office before the survey became final and the plats authoritative."

In a later case, the whole subject was again canvassed by this Court. In that case it was urged, as against the operation of a certain statutory provision:

"That the township plat was not *in terms* approved by the Commissioner of the General Land Office."

The Court, in disposing of this question, quotes approvingly from a decision of the Secretary of Interior, of date August 7, 1877, which was in the following language:

"By the Act of Congress approved May 1, 1796 (1 Stats., 464), 'providing for the sale of the lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky River,' the Surveyor-General was authorized to prepare plats of the townships surveyed, to keep one copy of the same in his office for public information, and to send other copies to the 'places of sale' and to the Secretary of the Treasury. The present local land offices are equivalent to the 'places of sale' mentioned in the act of 1796, and as a matter of practice, from that date to the present time the township plats prepared by the Surveyor-General have been filed by him with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States. There is nothing in the Act of 1796, or in the subsequent acts, which requires the approval of the Commissioner of the General Land Office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various acts providing for the survey of the public lands, but is contrary to the uniform practice of this department. There can be no doubt but that under the Act of July 4,

1836, reorganizing the General Land Office, the Commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the Surveyor-General."

Tubbs vs. Wilhoit, 138 U. S., 134, 143.

After quoting from the Secretary of the Interior, the Court remarked:

"This view of the Secretary was referred to and held to be correct, in *Frasher vs. O'Connor*, 115 U. S., 102, 114."

In a much earlier case the Court used this language:

"A survey made under the direction of *the officer designated to have it made*, and approved by him, was final and conclusive, unless an appeal were taken to the Commissioner of the General Land Office."

Dent vs. Emmeger, 14 Wall., 308, 313.

See also cases already cited, to wit: *Menard's Heirs vs. Massey*, 8 How., 293, where the field notes returned to the *Surveyor-General's* office, and the description and plat, made up and approved by the Surveyor-General, were held conclusive, and *Bryan vs. Forsyth*, 19 How., 334, 336.

In the case of *Willot vs. Sandford*, 19 How., 79, the Court remarked:

"When the survey of 1817 for Dissonet's land was recognized at the *Surveyor General's* office as properly executed, which was certainly as early as 1823, then Dissonet had a title that he could enforce by the laws of Missouri."

From the course of legislation here set forth, and from the authorities cited, when taken in

connection with the particular statute under which the plaintiff claims title, it is certainly very clear that the particular officer of the Government whose duty it was to determine the character of the land selected, and to make the location of the grant thereon, was the Surveyor General, subject only to the power of supervision and control on the part of the Commissioner of the General Land Office.

Commissioner Edmunds, in some of his instructions as to this case, speaks of approval in his office. Thus, in his letter of March 13, 1863, he says:

"It is necessary, before the application *can be approved by this office*, that it be accompanied by" certain certificates. (Printed record, page 5.)

This was repeated in the letter of November 2, 1863. (Printed record, page 6.)

These expressions were manifestly not intended to convey the idea that on final acceptance of the application, the Commissioner would *endorse upon the papers* the fact of his approval, *in terms*, or issue any *written declaration of approval*. In view of the existing law and the established practice of the department, these words manifestly meant that unless the prescribed conditions were complied with, the Commissioner would, under his power of supervision, *disapprove* the application and *overrule* the action of the Surveyor General.

That this was what Commissioner Edmunds meant by those words, is demonstrated also by his own subsequent acts. When the contract and instructions for the survey of the selected lands were sent to him, in October, 1863. (printed record, pages 5 and 6,) he disapproved them, there being

no evidence that the lands selected were vacant and non-mineral. (Printed record, page 6.) When a certificate of the Surveyor General was then forwarded, with an explanatory letter, (printed record, page 7,) he again expressed his disapproval, because "the evidence furnished by you is *not sufficient*, in the opinion of this office, to prove that the selection No. 4 does not cover valuable mineral deposits." (Printed record, page 8.)

When, then, additional evidence was furnished, and he had no further objection to make, what course did he pursue? He did not himself endorse an approval or make in terms some written declaration of his conclusion. That would not accord either with the law or with the practice of his office. He says to the Surveyor General:

"*You* are authorized, in virtue of the aforesaid sixth section of the said act of twenty-first of June, 1860, to approve the said survey." (Printed record, page 10.)

When, then, the survey and plat, bearing the approval of the Surveyor General, are sent to him, he acknowledges their receipt and makes no objection thereto. Immediately afterwards he incorporated the plat into the Government maps, reported the survey to the Secretary of the Interior, who in turn included it in his report to the President, and the President transmitted the report to Congress.

Ex. Doc. No. 1, H. R. 38th Cong., 2d Sess.
Report Sec. Interior, 1864, pages 24 and 95.

From the law relating to the subject, from the practice of the department, and from the course pursued in this particular case, we submit that it

is a matter beyond controversy that the Surveyor General was the officer whose duty it was, as the representative of the Government, to decide as to the character of the land, subject only to the supervisory power of the Commissioner, and that the action of the Surveyor General, when received without objection by his superior officers, became final.

Commissioner McFarland, speaking of this particular transaction, says: "The land in question was determined in 1864, by the Surveyor-General, *whose province and duty it was*, to be non-mineral. The location was then perfected and the title passed." (Printed record, page 15.)

The only determination *in Washington*, contemplated by the law, was that the final decision of the Surveyor General should be there received, with knowledge of the evidence, and without objection by the Commissioner. Such determination was made.

2. The Surveyor General did determine the land to be non-mineral, and this decision was accepted by the Commissioner, with full knowledge of the evidence, and without any objection.

The evidence as to the determination by the proper officers, as to the character of the land located is very strong. Very great pains were taken in investigating the question. It was not a mere *pro forma* transaction. Governor Gilpin was interested in the grant, through a contract with its owners, and afterwards became its grantee, by conveyance. The Commissioner was advised by the first Surveyor General of Colorado that Governor Gilpin, in casual conversation, had expressed

an opinion that this selection would cover rich mineral in the mountains. (Printed record, page 5.)

This suggestion, although in the nature of mere gossip, caused the Commissioner to exercise very great care in his supervision of proceedings relating to the location of this grant. He had already required, for the satisfaction of his office, that when application was sent for any particular body of lands selected by the heirs of Baca, the final rendition of the certificate should be accompanied by a statement from the Surveyor General, and a like statement from the Register and Receiver, that the land was "vacant and not mineral."

In the letter of instructions of March 13, 1863, special prominence was given to this requirement, by reason of the statement attributed to ex-Governor Gilpin, the Commissioner saying:

"Especially should the character of the location, as to minerals, be carefully ascertained, after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office." (Printed record, page 5.)

And the Commissioner then proceeds to say:

"Whenever *you* shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable you so to do, you will transmit to this office your official certificate setting forth these facts.

"You will also correspond with the Register and Receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office." (Printed record, page 5.)

It is unquestionable that the Surveyor General did, in form, and with emphasis, himself make the decision and certify to it, in accordance with these instructions. Under date of December 5, 1863, he certifies to the Commissioner, as follows:

"This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis Valley, and marked out by a survey made by Albinus Z. Sheldon, in November, 1863, *is not mineral*, and is vacant." (Printed record, page 8.)

Except for the directions given by the Commissioner of the General Land Office, this certificate, if it stood alone, would, under the law, be a final and authoritative decision upon the question. But, under his power of supervision, the Commissioner had required additional evidence to be transmitted, and when Surveyor General Pierce, without transmitting any other evidence, sends his own certificate, as here quoted, with a letter explaining the grounds upon which he makes the certificate, it proves not to be satisfactory to the Commissioner of the General Land Office, and the reason again exists in the statement attributed to ex-Governor Gilpin by Surveyor General Case. (Printed record, page 9.)

That statement, so attributed to ex-Governor Gilpin, becomes ultimately an element of strength in this title, rather than an element of weakness, because it invokes a full investigation of the facts on the part of the Commissioner, before the papers are allowed to pass the scrutiny of his office.

Now, after this second disapproval, which bears date of January 16, 1864, what follows? The evi-

dence shows, by necessary deduction, that Governor Gilpin went personally to Washington. We are not advised as to all of the evidence which he there submitted. We do know that he submitted sufficient to satisfy the Commissioner that the land was non-mineral. And we also know that, in addition to the evidence which had been previously transmitted by the Surveyor General, Mr. Gilpin took with him to Washington, the certificate of the *Register and Receiver*, which had not before been sent, together with the notes of the surveyor, who had by that time gone over the grant, and completed his survey, and who had set forth in detail a description of the land and of its character. He found no mineral. (Printed record, page 11.)

On page 10 of the printed record, appears a letter of the Commissioner, transmitting to the Surveyor General various papers, including those last mentioned, and it is stated:

"These papers were deposited in this office by Mr. Gilpin, and are transmitted to you for such action as *you shall deem proper in the premises*, in accordance with the views expressed *in our communication to you dated the twelfth instant*."

This letter was written on February 26, 1864, and the communication referred to was written on February 12, 1864, and appears at page 9 of the printed record.

From the letter of February 12, 1864, it is manifest that, as to the one question upon which the Commissioner had not been satisfied before, he was now fully satisfied; for he makes no further objection whatever as to the sufficiency of the evidence concerning the character of the land; he

gives directions by which the survey may be accepted and approved, and then, in express terms, directs the Surveyor General, upon bringing the survey to the usual satisfactory tests, to approve the survey, in virtue of, and in accordance with, the provisions of the granting act.

We call the attention of the Court to the fact that all the objections which the Commissioner made, from time to time, were based upon the insufficiency of evidence to show that the land was not mineral. When the Commissioner disapproved the contract and instructions to the Deputy Surveyor, in the letter of November 2, 1863, it was because there was no evidence that the land proposed to be surveyed was *not* mineral land. (Printed record, pages 6 and 7.) When, on January 16, 1864, he directed that the approval of the selection should stand *suspended* until satisfactory proof should be obtained, he was referring to proof as to whether Selection No. 4 covered valuable mineral deposits. (Printed record, page 8.)

These having been the particular points of objection to the proceedings, when we find that additional evidence was furnished and produced before the Commissioner, and that he then supersedes his letter, in which he directed a *suspension*, by a subsequent letter in which he directs an *approval*, there seems to be no room for doubt that the evidence as to the non-mineral character of the land had become satisfactory to him; for otherwise he would not, under the circumstances, have directed the Surveyor General to approve the survey.

The evidence, we submit, is conclusive, not only that the Surveyor General, who was designated by statute as the person to locate this land,

determined, after investigation, that the land was not mineral, but also that his finding, with the evidence produced in support thereof, was satisfactory to and accepted by the Commissioner of the General Land Office.

The land in controversy was then determined, in 1864, by the proper officers of the Government, after investigation of the facts, to be non-mineral in character.

3. The determination of the officers of the government concerning the non-mineral character of the land, is conclusive against all subsequent claimants.

The trial Court, in his instructions, correctly announces the law, in these words:

"I have said the grantees under that act, the heirs of Baca, were required to select lands which were not mineral. In any selection which they could make *they* could not determine the quality of the lands in that respect; that is to say they could not determine, in a manner which would be *conclusive upon the Government*, and upon subsequent claimants under the Government, whether the lands were or were not mineral. In order to make a valid determination of that matter, there must be some participation by the Government in the selection; that is to say, the Government must investigate and pass upon the question whether the lands selected were or were not mineral." (Printed record, page 17.)

We admit this, *in toto*, and the statute itself, as already argued, designated the Surveyor General as the representative of the Government who should participate in the location, and who should investigate and pass upon the question whether or not the lands selected were mineral lands.

Not only did the Surveyor General, so designated by the law, represent the Government in this determination and location of the lands, but he did it under the active, personal supervision of the Commissioner of the General Land Office, who thereby became himself a factor in the decision and determination, which thereupon became necessarily conclusive against the Government and subsequent claimants.

We have already called attention to the case of *Menard's Heirs vs. Massey*, 8 How., 293, and the holding of the Court in that case, that the survey, when the field notes were returned to the Surveyor General's office and the description and plat were made out and approved by the Surveyor General, became conclusive evidence, as against the United States; and the Court says:

"This construction depends upon the fact that the claimants and the United States were parties to the selection of the lands, for, as they agreed to the survey, they are mutually bound and estopped by it."

8 How., 314.

The principle here announced is recognized in other cases already cited:

Cousin vs. Labatut, 19 How., 209.

Bryan vs. Forsyth, 19 How., 334.

See also—

Ballance vs. Forsyth, 24 How., 185.

This Court has, in very clear language, in numerous cases, declared the findings of the officers of the Land Department, as to the nature of the land, to be conclusive. The following citations may be selected, out of many:

"For the transfer of that title [of the Government] the law has made numerous provisions designating the persons who may acquire it, and the terms of its acquisition. That the provisions may be properly carried out, the Land Department, as part of the administrative and executive branch of the Government, has been created, to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore it has been held that their judgment as to matters of fact properly determinable by them, is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals, upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment."

Smelting Company vs. Kemp, 104 U. S., 636, 640.

"That department [the Land Department], as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different Acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the *nature of the land*, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this Court, in repeated decisions."

Steel vs. Smelting Co., 106 U. S., 447, 451.

"The question whether or not the lands returned as 'subject to periodical overflow' are within the descriptive terms of those granted by the Swamp Land Act—that is, whether they are 'swamp and overflowed'—is a question of fact properly determinable by the Land Department. It is settled, by an unbroken line of decisions of this Court in land jurisprudence, that the decisions of that department, upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding upon the Courts of the country [citing authorities.] We are of opinion, therefore, that the decision of the Land Department on a question of the actual physical character of certain lands, is not subject to review by the Courts."

Heath vs. Wallace, 138 U. S., 573, 585.

"It is conceded to be of the utmost importance to the prosperity of the country, that title to lands and to minerals in them, shall be settled and not be a subject of constant and ever-recurring disputes and litigation, to the disturbance of individuals and the annoyance of the public. We do not think that any apprehension of disturbance in titles, from the views we assert, need arise. The law places under the supervision of the Interior Department, *and its subordinate officers acting under its direction*, the control of all matters affecting the disposition of public lands of the United States and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon, and determine the character of lands to which different parties assert a right, and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of a character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands,

agricultural lands, or mineral lands, and so designate them in the patent which it issues. * * *

"'That the provisions may be properly carried out, the Land Department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this Court, that their judgment as to matters of fact properly determinable by them is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of any other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment.'" * * * * * * *

"There are undoubtedly many cases arising before the Land Department, in the disposition of the public lands, where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands *obtained at the time* as to their real character. The determination of the fact, by these officers, that they are one or the other, *will be considered conclusive.*"

Barden vs. Northern Pacific R. R., 154 U. S., 288, 326, 327, 329.

We most earnestly, but with very great confidence, contend before this Court, that this land now in controversy was, in 1864, determined by the

Government to be non-mineral, and that determination has, since that date, been absolutely binding and conclusive upon all claimants.

III.

No subsequent discovery of mineral could divest the title derived through the grant made by Congress to the heirs of Baca, or exclude therefrom any portion of the surveyed premises.

This proposition would seem to be logically established by the argument already made. The views expressed by the trial Court demand, however, that it should be further discussed.

Commissioner Edmunds, in his letter of February 12, 1864, after authorizing the approval of the survey, added these words: "But in your certificate of approval you will add the special reservation stipulated by the statute—but not to embrace mineral land, nor to interfere with any other vested rights, if such exist." (Printed record, page 10.)

The trial Court thus construes this language:

"The communication upon which the Surveyor General of the territory of Colorado approved the plat and the notes of survey expressly required, in making such approval, that it should be declared that the lands within the tract were not regarded as mineral," and after quoting the words of the Commissioner, the Court proceeds: "That is to say, the Surveyor General of Colorado was authorized to approve the plat in so far as it did not embrace mineral land; the Commissioner of the General Land Office apparently declining to decide the question whether the land selected was or was not of that character." (Printed record, pages 18–20.)

In using this language, the Court seems to have looked only to the words of this letter alone, and to have ignored the statute making the grant, as well as all the previous acts and directions of the Commissioner.

How it is possible to say that the Commissioner *declined* "to decide the question whether the land selected was or was not of that character" (so far as the duty of decision rested upon him), in the face of the fact that the law did not authorize the selection, survey or location of any land except that which was vacant and non-mineral? How could the Commissioner authorize the approval of the location, unless he was first satisfied that it came within the terms of the law? How can it be said that he declined to decide, when he had expressly directed that, before even a contract for survey could be approved, there must be evidence that the land selected was of the character which Congress had said could be located—that is, that it was non-mineral? How can a refusal to decide be inferred, when the Commission had again ordered suspension of approval of the survey until additional evidence should be furnished of the non-mineral character of the land, and when he finally authorized approval only after such additional evidence had been adduced? Under such circumstances, the *direction to approve* in itself constitutes a *decision* that the land was of the character granted by the act.

The trial Court says: "Taken in connection with the instructions under which he [the Surveyor General] was acting, the approval must be regarded as the same as if he had put the exact words given to him by the Commissioner into the

approval. So that I feel bound to say that the approval was with the condition that the plat should not embrace mineral lands, as directed by the Commissioner." (Printed record, pages 18, 20.)

The Commissioner of the General Land Office was not the grantor of these lands; he did not and could not fix the terms and conditions of the grant. We shall show hereafter that he did not attempt to do so. He could not vary the terms of the grant itself. Any directions of his must be construed in harmony with the statute under which he was acting.

Under well settled law, however, the grant conveyed all the lands surveyed, except so far as they were *known* to be mineral at the time the grant attached to them. A *subsequent* discovery of mineral would not divest the title or exclude from the grant the land so subsequently found to contain mineral.

This proposition was vigorously combated in the Court below. We maintain that it is upheld by a long line of consistent decisions, both in the Land Department itself and in this Court.

This Court, in the case of *Davis's Administrator vs. Weibbold*, 139 U. S., 507, cites with approbation a number of decisions in the Land Department bearing upon this question, to which we briefly ask the attention of the Court:

"It has been repeatedly held by this department that it must appear 'not that neighboring or adjoining lands are mineral in character, or that that in dispute *may hereafter* by possibility develop minerals in such quantity as will establish its mineral, rather than its agricultural, character, but that as a *present fact* it is mineral in character.'"

Cleghorn vs. Bird, 4 Land Dec., 478.

The language here quoted was used by Secretary Lamar, and the same Secretary repeated this enunciation of the law in

Commissioners of Kings Co. vs. Alexander, 5 Land Dec., 126.

Acting Secretary Muldrow used like language in

Magalia Gold Mining Co. vs. Ferguson, 6 Land Dec., 218.

The subject was discussed fully, and the same conclusion reached, by Secretary Vilas in the

Appeal of John Downs, 7 Land Dec., 71.

And again by Secretary Vilas in

Creswell Mining Co. vs. Johnson, 8 Land Dec., 440.

And by Assistant Secretary Chandler in the

Appeal of Thomas J. Laney, 9 Land Dec., 83.

Secretary Lamar adopted the same principle in a decision relating to the very statute in controversy, being the case of

Baca Float No. 3, 5 Land Dec., 705,

Where the Secretary uses these words:

"If selection and location of this claim has been made prior to June 21, 1863, of lands not mineral, *or not known to be mineral*, agreeable to the provisions of said Act, there is no power or authority in the department to cancel such selection," etc.

In the same opinion, Secretary Lamar uses this language:

"A similar question came before your office on the application of William Gilpin for patent to Baca Claim No. 4. In that case it was claimed by the Government that the land was mineral and that the Surveyor General approved the plat of survey subject to the conditions and provisions of the Act of June 21, 1860. Commissioner Williamson, however, held that 'the Surveyor General did not undertake and had no authority to impose conditions not in the act,' and that 'the question as to the mineral or non mineral character of this land has been passed upon by competent authority, the title has passed from the Government and vested in private individuals; this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.

"In the case above referred to, it was urged by the government that the mineral character of the land was sufficient to invalidate the selection and location."

(*Ib.*, pages 706 and 707.)

We find here the Secretary of the Interior, who afterwards became a justice of the Supreme Court of the United States, quoting with approbation the decision of Commissioner Williamson, in reference to the very tract of land now in controversy, and upon the very subject under consideration.

In the dissenting opinion in the case of *Barden vs. Northern Pacific R. R. Co.*, 154 U. S., 342, Mr. Justice Brewer cites a circular of instructions, issued by the Commissioner of the General Land Office, on October 12, 1853, construing the term "mineral lands," in an act relating to public lands in California, in which the Commissioner defined these words as meaning "lands on which are situated any *known* salines or mines."

We call attention, also, to a quotation made by Mr. Justice Brewer in this dissenting opinion

from Secretary Schurz's decision, in the case of *State vs. Poley and Thomas* (4 Copp's L. O.)

It seems the following question was presented: "Did the title to lands in said sections vest in the state, *upon survey*, if their mineral character was unknown at the time, and the same were regarded by the officers of the Government as ordinary public lands, not reserved or otherwise appropriated, but subject to disposal under the general laws of the United States?" The Secretary's answer, quoted by Mr. Justice Brewer, is as follows:

"In compliance with the doctrine established by the Courts, it must, I think, be held that the title vested in the State at the *date of the survey*, when the land was not known to be mineral or was not treated as such by the Government. If, following the doctrine of the Courts, the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be affected? If for three years, why not for ten or fifty, or after the title derived from the State has been transmitted through numerous grantees? For lands confessedly not mineral at the date of survey may, many years thereafter, be ascertained, through improvements in mining operations, to be valuable as mineral lands. To maintain such a doctrine might result in placing in jeopardy the title held by grantees to all the school lands held in California, and could only be authorized by the most positive and clearly expressed provisions of law. In my opinion there is nothing in the Act which can thus be interpreted. I must therefore hold that the discovery of the mineral character of the land in Sections 16 and 36, *subsequent to survey*, does not defeat the title of the State to the same as school lands."

Barden vs. Northern Pacific R. R. Co., 154 U. S., 342.

The views of this Court upon the question here presented have been very clearly and emphatically expressed:

"It is plain from this brief statement of the legislation of Congress that no title from the United States to land *known at the time of sale* to be valuable for its minerals of gold, silver, cinnabar or copper, can be obtained * * * in any other way than as prescribed by the laws specially authorizing the sale of such land. * * * We say 'land *known* at the time to be *valuable* for its minerals,' as there are vast tracts of public lands in which minerals of different kinds are found but not in such quantity as to justify expenditure in the effort to extract them. * * * * * * *

"We also say lands *known at the time* of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of the sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued."

Deffeback vs. Hawke, 115 U. S., 392, 404.

"A change in the conditions occurring subsequently to the sale, whereby new discoveries are made or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale."

Colorado Coal and Iron Co. vs. U. S., 123 U. S., 307, 328.

Speaking of placer claims and lodes therein, this Court says:

"The subsequent discovery of lodes upon the ground and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time."

U. S. vs. Iron Silver Mining Co., 128 U. S., 673, 683.

The subject was very elaborately and thoroughly discussed in a later case in the Supreme Court. The whole case is of value, but the gist of it, so far as the question under consideration is concerned, may be found in two passages:

"It would seem from this uniform construction of that department of the government specially entrusted with the supervision of proceedings required for the alienation of the public lands, including those that embraced minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant, in the Acts of Congress, should be considered to apply only to such lands as were *at the time of the grant* known to be so valuable for their minerals as to justify expenditure for their extraction. The *grant, or* patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated. * * *

"Our conclusion, as already substantially stated, is that Congress only intended to preserve *existing rights* to known mines of gold, silver, cinnabar or copper, and to *known* mining claims and possessions, against any assertion of title to them by virtue of the conveyances received under the townsite act, and not to leave titles of purchasers on the townsites to be disturbed by future discoveries."

Davis's Administrator vs. Weibbold, 139 U. S., 507, 524, 526.

It was contended in the trial below, and the contention seems to have affected the Court, that the opinion of a majority of this Court, in the case of *Barden vs. Northern Pacific R. R. Co.*, 154 U. S., 288, changed the rule which is so clearly set forth in the decisions already cited. We most respectfully insist that it does not have that effect.

The opinion of a majority of the Court in the *Barden* case was written by Mr. Justice Field. He was also the author of the opinions of the Court in the case of *Deffeback vs. Hawke* and in *Davis's Administrator vs. Weibbold*, a fact to which he himself calls attention in the *Barden* case. He does not overrule the former decisions, but distinguishes them.

The *Barden* decision related to a railroad grant, of which the Court says:

"The tract granted covered a belt believed to be rich in minerals of gold and silver, and the United States were at the time engaged in a terrific conflict for the preservation of the Union, incurring an immense debt, exceeding two thousand millions, and many of their citizens engaged in the struggle looked forward hopefully and confidently to this source of relief to the burdened treasury. And we cannot with reason suppose that, under these circumstances, the United States intended that the control of this source of wealth and relief should be taken from them. It passes belief that they could have deliberately designed, in this hour of sore distress and fearful pressure upon their finances, to give away to a corporation of their own creation not only an imperial domain in land, but the boundless wealth that might lie buried in the mineral regions covered by 80,000 square miles." (*Ib.*, 318.)

The Court, in the very beginning of the dis-

cussion, calls attention to a prohibitory Act of Congress relating to grants in aid of railroads, in these words:

"That no act passed at the first session of the Thirty-eighth Congress [that being of the year 1864], granting lands to *states* or *corporations* to aid in the construction of roads or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which, in all cases, shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. (13 Stat., 567.)" (*Ib.*, 312.)

This prohibitory statute is the foundation of the argument of the Court in the *Barden* case. The Court says, on page 318:

"Patents issued after an examination and determination of the fact by the Government whether portions of the land embraced in such grants did or did not contain other minerals, have been held as conclusive in subsequent controversies. Of this we shall speak more fully hereafter; but grants in *aid of railroads* (and we speak of *no other grants*) before such determination and issue of a patent, have never been held to pass other minerals than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case."

Speaking of the case of *Deffeback vs. Hawke*, the Court says, in the *Barden* case:

"This was not a case arising upon a grant like the one under consideration at present." (*Ib.*, 323.)

And referring to the case of *Davis's Administrator vs. Weibbold*, the Court says:

"The effect given to the townsite patent will be found not inconsistent with the views hereafter expressed in the present case." (*Ib.*, 324.)

We have already quoted from the majority opinion in the case of *Barden vs. Northern Pacific R. R. Co.*, to show that the Court adopts, in very emphatic language, the doctrine, that when the Interior Department *and its subordinate officers* acting under its direction have determined the character of the land, that determination is conclusive:

"That the decision, unless set aside and annulled by direct proceedings, estops the Government from contending to the contrary, and * * in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

We have already argued, as we think, conclusively, that under the circumstances of this case, and in view of the terms of the granting act and of the proceedings thereunder, the decision as to the character of the land was made and the title passed, at the time of the final approval of the survey, with the same effect as if a patent had on that day been issued. If so, then the majority opinion in the case of *Barden vs. Northern Pacific R. R. Co.*, instead of being an argument against our position, becomes an authority of very great weight in our favor.

We confidently assert that the views expressed by Mr. Justice Field in reference to the Northern Pacific Grant are of such a character, in view of his former decisions, which he does not overrule, that they do not to any extent militate against, but, on the contrary, do sustain, our contention in this case, that the heirs of Baca received the title of the Government to all of the lands included within the boundaries of their approved survey, and that a subsequent discovery of mineral in any portion

thereof will not in the slightest degree invalidate the grant.

When we consider the matter in connection with the investigation and determination as to the character of the land, before the final authority given by the Commissioner of the General Land Office to the Surveyor General to approve this survey, the argument becomes overwhelming, even upon the case of *Barden vs. Northern Pacific R. R. Co.*, that the title did pass, as to this grant, in 1864.

It is very apparent that the statue of June 21, 1860, should be read as if the words "not known to be mineral at the date of final location" had been inserted in the act itself, as such is the interpretation which is given to the Act, and all similar Acts, from the earliest time. When the Act is thus interpreted, then the question comes, what effect is to be given to the words used by the Commissioner of the General Land Office, in his letter of February 12, 1864, where, after speaking of the approval, he says: "You will add the special reservation stipulated by the statute—but not to embrace mineral land nor to interfere with any other vested rights, if such exist." (Printed record, page 10.)

Manifestly, the same rule of construction must be applied in construing the Commissioner's words as is used concerning the grant itself. If, in the interpretation of the grant, we insert the word "known," so the word "known" must be inserted in the direction of the Commissioner, and it would read "not to embrace *known* mineral lands, nor to interfere with any other vested rights, if such exist." We cannot give the one construction to the

granting Act and a different construction to the words of the Commissioner. Even if a patent had been issued under some authority of law, and the very words used by the Commissioner in his letter had been inserted in the patent, to wit, "but not to embrace mineral land, nor to interfere with any other vested rights, if such exist," the construction that would have to be placed upon these words in the patent would be to confine the limitation to lands known to be mineral at the time the patent issued; and for the very well established reason that the Commissioner could not make any limitations which the grant itself did not make.

This subject was very elaborately discussed by Judge Sawyer, in a decision which is approvingly cited by this Court, through Mr. Justice Field, in the case of *Davis's Administrator vs. Weibbold*, already frequently referred to. (139 U. S., 520.) In the case referred to, Judge Sawyer says:

"The Land Department, in this very case, as in cases of patents to pre-emptioners, homestead claimants, and other purchasers of public lands, have acted, and I think correctly, upon the idea that patents to lands not known to be mineral lands at the time the patents issued, carried the title to mines subsequently discovered in the lands, notwithstanding the reservation from sale of mineral lands, in the Acts of Congress. By the words 'mineral lands' must be understood lands known to be such, or which there is satisfactory reason to believe are such at the time of the grant or patent; and the United States Courts which have had occasion to act upon this subject, so far as I am aware, have adopted that idea. (*Pacific Coast M. and M. Co. vs. Spargo*, 8 Sawyer, 645.)

"There must be some point of time when the character of the land must be finally determined, and for the interest of all concerned there can be

no better point to determine this question than at the time of issuing the patent. * * * *

"If land which a party has actually occupied, possessed, and peaceably enjoyed for a long series of years, claiming title under a patent of the United States fifteen years old, can be entered upon and prospected for a mine, by any trespasser who chooses to do so, and, a mine being found, the mine can be located and taken out of the patent on the vague and uncertain exception in the patent in question, it can be done fifty or a hundred years hence, and the patent, instead of being a muniment of title upon which the patentee, or his grantees can rest in security, would be but a delusion and a snare. Congress could never have contemplated such a construction and execution of the acts in question."

Cowell vs. Lammers, 10 Sawyer, 257, 258.

Judge Sawyer, after discussing historically the subject of settlements of government lands and sales of such lands, says:

"Are the owners of all these lands, thus sold, to be for all time liable to have their possession, held under patents upon their face regularly issued, intruded upon by any trespasser who chooses to prospect his orchard, or vineyard, or pasture, for a mine, and, when the mine shall be found, have it taken from him by the intruder, under the claim that the patent is void upon the grounds insisted upon in this case, that the land was not sold, in the case of purchasers, or was not granted, in the case of the railroad company? If such be the case there is certainly a serious defect in the laws or in their execution. I am unable to discover or believe that such a position is sanctioned by the laws or by the decisions of the Supreme Court."

"*The exception of mineral lands from the grant in the Act of Congress is explicit.* There is no express authority—no provision at all—requiring or authorizing this exception to be repeated in the patent. The lands patentable under the grant, *and*

no others, are to be patented. If the exception in the patent is no broader in its significance than the statute, it *adds nothing to and takes nothing from the effect of the statute itself*, in this respect, or to the effect of the patent issued in pursuance of the statute. If it is broader than the statute, then it is absolutely unauthorized by law, and as to the part which goes beyond the statute, at least, is utterly void. A patent upon its face should either grant or not grant. It must be seen, from a construction of the language of the grant itself, whether anything is granted or not, and if anything be granted, what it is. There is no authority to issue a patent, which, in effect, says: If the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine from the face of the patent whether anything is granted or not. The most that can be said, then, is, that the clause of exception and exclusion in the patent in no way affects the rights of the parties given by the statute—in no way enlarges or restricts those rights—and the same force and effect must be given to the patent on a collateral attack, as would be given to it had the clause been omitted, as both classes of patents would depend upon, and be controlled by, the same or similar statutory provisions."

Cowell vs. Lammers, 10 Sawyer, 259, 260.

It seems to us that these words of the distinguished jurist apply with great force to the case at bar. If our construction of the granting act is correct, then no words which the Commissioner directed should be inserted in the approval can modify or limit the effect of the grant. If no broader than the statute, they add nothing to, and take nothing from, the effect of the statute itself. If broader than the statute, then they are wholly

unauthorized by law, and as to the part which goes beyond the statute, are utterly void.

It is very apparent, from the very language used by the Commissioner, that he did not intend to make a limitation which would depend upon future discoveries of mineral in the granted premises. As much as ten years before this time, his own predecessor in office had construed "mineral lands" as used in the Act of March 3, 1853, to mean "lands on which are situated *known* salines or mines." (See citation by Justice Brewer, already quoted.)

The Commissioner must have had in mind this construction and these words, and the language he himself uses, indicates that such was his idea. He says:

"But not to embrace mineral land, nor to interfere with any *other* vested rights, if such exist."

Why did he say "other" vested rights? The very word implies that the alternative expression involved some "vested rights," and our minds at once revert to the words of Justice Field, in the case of *Davis's Administrator vs. Weibbold*, where he says that Congress "only intended to preserve *existing rights* to known mines of gold, silver or copper, and to *known mining claims and possessions*."

By speaking of "mineral lands" and "other vested rights," is it not very clear that the Commissioner had in mind that, if there were then *known mining claims or possessions*, they with other rights acquired before the date of this location, would be reserved, and not pass by grant to the heirs of Baca? We respectfully submit, that not only the proper construction of the law, but the very words

of the Commissioner, indicate that he must have intended to convey only the idea that known mines were reserved. But, inasmuch as there were no *known mines* at that time, and there is not a scintilla of evidence that any of the land was known to be mineral, in 1864, then, manifestly, the entire grant passed to the heirs of Baca, and from them to their grantees.

Commissioner Williamson was, of course, familiar with the records, and with the practice of his department of the government. He was also familiar with the decisions of the Courts, and his views have been supported by the subsequent decisions of the Supreme Court of the United States. The whole subject is well summed up in his letter of March 21, 1879, relating to this particular grant, and we venture once more to quote from it, in concluding this branch of our discussion:

"After the selection of this tract, it was surveyed and located by the Surveyor General of Colorado, he having first determined that the land was vacant and non-mineral.

"The seventeenth section of the Act of Congress, approved February 28, 1861, gave the Surveyor General of Colorado the same authority concerning the location of this tract as was originally conferred on the Surveyor General of New Mexico.

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the Surveyor General of Colorado that as the statute did not authorize the issuing of a patent, the Act of June 21, 1860, and the plat approved by the *Surveyor General*, would constitute the evidence of title.

"There is no doubt that Government may convey and vest the legal title without issuing a patent *as effectually* as may be done by patent. * * *

"The Surveyor General was authorized by the act to locate only vacant, non-mineral land. Unless the contrary appeared it would be presumed from the act of locating that the Surveyor General determined the land was not mineral. But before locating, the Surveyor General had expressly found and certified that this land was not mineral.

"It is now alleged that the land is mineral; that the Surveyor General approved the plat of survey, 'subject to the conditions and provisions of Section 6 of the Act of Congress approved June 21, 1860,' and that therefore the grantees cannot hold the land under that act.

"The conditions and provisions of the Act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be non-mineral land.

"The Act did not intend that if at any subsequent time in the remote future, mineral land should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as any one might choose to allege its mineral character.

"The Surveyor General did not undertake, and had no power to impose conditions not in the Act.

"If, after fifteen years, the questions as to the mineral character of the land may be re-opened, why may it not be raised again after the lapse of any number of years? If the question may be re-opened as to the land granted under the provisions of the Act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption and other acts of Congress? Would such title ever be considered secure?

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority; the title has passed from the Government and vested in private individuals." (Printed record, pages 12 and 13.)

The following additional authorities are worthy of investigation, in connection with the subjects discussed in this brief:

Wisconsin R. R. Co. vs. Price County, 133 U. S., 496, 506.

St. Paul & Pacific vs. Northern Pacific, 139 U. S., 1, 6.

Deseret Salt Co. vs. Tarpey, 142 U. S., 241, 249.

Bishop of Nesqually vs. Gibbon, 158 U. S., 155, 167.

Stoneroad vs. Stoneroad, 158 U. S. 240.

Russell vs. Maxwell Land Grant Co., 158 U. S., 253.

CONCLUSION.

The heirs of Baca and their grantees have been in possession of this grant for more than thirty years.

The grant is far removed from any of the producing mining sections of the State. It is on the *eastern* edge of the San Luis valley—a level tract of country larger in area than the State of Connecticut, and lying on the eastern side of the main range of the Rocky Mountains.

Its owners use it for agricultural and pastoral purposes. Its northeast corner extends into the Sangre de Cristo Mountains, where are found the only timber lands of the grant. Here, also, are the sources of the streams on which the grant must depend for water for its irrigable lands.

In the chase after gold, men are now trespassing on this grant; not because they know that gold in paying quantity exists there, but hoping and trying to find it. According to the view of the trial Court, they cannot be ejected unless the grant owners can affirmatively prove, as a fact existing *now*, after thirty years' possession, that the particu-

lar spot trespassed upon is *not* mineral in character. In the language of Judge Sawyer, this makes the grant of the Government, instead of a muniment of title, a delusion and a snare. It enables the defendant in this case, and, of course, hundreds of others, with equal right, to dig pits and sink shafts where they please on the grant, endangering the lives of cattle, horses and men; and to cut down timber; to shut off the owners of the grant even from the grazing on certain of the lands, and to divert the waters of the streams from irrigating ditches below, resulting in the destruction of crops.

Is it possible that this grant, made for a consideration, in exchange for an equivalent area elsewhere, is to be so construed that its owners are liable, for all time, to have their possession intruded upon by any trespasser who chooses to prospect their "orchard or vineyard, or pasture" for a mine; and if a mine shall be found, to have it taken from them by the intruder, on the theory that the Government grant, made more than thirty years before, did not convey land, in which the intruder may happen to find mineral?

We submit to the Court, that under the facts of this case, and the law applicable to it, such a construction cannot for a moment be tolerated; and we ask this Court, by its decision, to vindicate the grant of the Government, which, we contend, vested in the heirs of Luis Maria Baca all the lands included within the exterior bounds of their survey.

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